SCOMM

101A:32

Protected Classes. What are the protected classes? They are identified by federal statutes, state statutes, and local ordinances. Under Title VII of the Civil Rights Act of 1964 [correct?], it is *an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, or sex.* [Make sure this quote is correct.] Under the Age Discrimination in the Employment Act of.... [is this a different act? If so, name, date...], *employees between the ages of 40 and 70* [quote valid?] are designated as a protected class. The American with Disabilities Act [is this a different act? If so, name, date...] protects *people with handicaps or disabilities (including HIV+ status) who can perform the essential functions of the job with reasonable accommodation.* [quote valid?] Some state statutes and local ordinances include sexual orientation and marital status as protected classes. The laws against employment discrimination do not protect only minorities. For example, Caucasians receive the same protection from Title VII as racial minorities, and, absent a legitimate affirmative action program, they may sue if race was a motivating factor in an employment decision. In summary, managers should be alert that they do not make employment decisions based on a person's...

Race
Color
Religion
National Origin
Sex
Age
Handicap or Disability (in certain instances)

Jurisdictional Limits. The federal anti-discrimination laws do not apply to small employers. Under Title VII and in the Americans with Disabilities Act, an employer must have **at least fifteen employees** for the statutes to apply. Under the Age Discrimination in Employment Act, the employer must have **twenty** employees. State versions of the federal anti-discrimination laws have their own jurisdictional limits but most are similar to the federal thresholds. [true???]

Damages. Prior to legislative amendments in 1991, the only remedies that a successful, aggrieved party ("plaintiff") could obtain for a proven violation of Title VII were equitable in nature. For examples, the plaintiff might receive back pay, reinstatement to a lost position, front pay if reinstatement was not available or appropriate, and the payment of reasonable attorney's fees and costs. In addition, the ADEA [what do these letters stand for????] provided for liquidated damages [definition?] if the employer's violation was found by a jury to be "willful." It was (and is) also possible for a court to impose other types of injunctive relief, such as requiring a company to instruct all managers or employees in non-discriminatory employment practices.

In 1991, our elected Congress amended the anti-discrimination statutes to authorize a broader range of remedies. Today successful plaintiffs are entitled to all the remedies identified above, plus the full range of compensatory damages previously available in personal injury litigation. This means that juries and courts [???] may require employers to pay for lost future earning capacity, emotional distress and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Plaintiffs may also request punitive damages when the conduct of the defendant is sufficiently egregious to warrant them. Unlike compensatory damages, which are intended to compensate the plaintiff for any emotional or pecuniary loss, the purpose of punitive damages is to punish the defendant and to make the defendant serve as an example for others. Under the federal employment discrimination laws, the total of compensatory and punitive damages are limited as follows:

Number of Employees	Damage Limit
15-100	$50,000
100-200	$100,000
200-500	$200,000
500+	$300,000

The state and local versions of Title VII provide similar rights and remedies.

Individual Liability. It is common for plaintiffs to name owners, managers, and supervisors as separate defendants in employment discrimination cases. Most--but not all--federal courts that have addressed the issue have ruled that only the corporation/employing entity is subject to suit for employment discrimination. The state counterparts of the federal legislation may authorize individual liability, depending on the language of the statute and the interpretation of that language by the state courts. Needless to say, the stress of a lawsuit is compounded when managers and supervisors have to worry about their individual assets being at risk.

In summary on the law of the land, and repeating the point made at the start of this chapter, it is difficult to every really "win" a suit involving employment discrimination. Far better to prevent it.

Types of Employment Discrimination Claims

Disparate Treatment. The most common claim made against businesses is for dissimilar ("disparate") treatment. An employee or potential employee claims that an employer treated her or him unfavorably or less favorably because of her or his membership in a protected class. For example, a male employee might allege that his employer promoted others over him because of his religion. Disparate treatment claims can be made by individuals, groups of people, or via a class action in which one person or a small group presumes to speak for a larger group as a whole. [is this descrption of class action O.K.?]

In a disparate treatment case, the ultimate question is whether the person making the claim's membership in a protected class was a factor in the adverse employment decision. Under federal law, the question that would be put to the jury is whether or not the person's membership in a protected class was a "determining factor" in the adverse decision. Some states use a lower standard than the federal law. Such states say an employer is liable if the person's membership in a protected class was a "substantial factor" (rather than a determining factor). In these kinds of cases, an employer must make its case by demonstrating a legitimate, *non-discriminatory* reason for the adverse decision, e.g. why the person was fired, or not hired, or demoted, or not promoted. **Solid documentation regarding substandard performance** [or qualifications????] is the best way to demonstrate non-discriminatory reasons for adverse decisions.

[redacted]

Post-it® Fax Note 7671	Date	# of pages ▶ 4
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Co./Dept.	Co.	
Phone #	Phone #	
Fax # 3834	Fax # 2029	

who acquired them : written assurance fro were produced in com of this chapter, and value without notice o be deemed unlawful;

(2) to violate any of or section 207 of this of any regulation or order of the Secretary issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods. (June 25, 1938, c. 676, § 15, 52 Stat. 1068; Oct. 26, 1949, c. 736, § 13, 63 Stat. 919; 1950 Reorg. Plan No. 6, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1949 Amendment

Amendment of section by Act Oct. 26, 1949, effective ninety days after Oct. 26, 1949, see note set out under § 202 of this title.

Transfer of Functions

All functions of all other officers of the Department of Labor and functions of all agencies and employees of such Department were, with the exception of the functions vested by the Administrative Procedure Act (§ 1001 et seq. of Title 5, Executive Departments and Government Officers and Employees) in hearing examiners employed by such Department, transferred to the Secretary of Labor, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by 1950 Reorg.Plan No. 6, §§ 1, 2, 15 F.R. 3174, 64 Stat. 1263, set out in note under § 611 of Title 5, Executive Departments and Government Officers and Employees.

...mination Against

Stat. 791, provided ...olitical subdivision ... agency and which ... an employee with ...erms or conditions ...uary 19, 1985, the ... coverage under section 7 of the Fair Labor Standards Act of 1938 [section 207 of this title] shall be held to have violated section 15(a)(3) of such Act [subsec. (a)(3) of this section]. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act [subsec. (a)(3) of this title]."

FEDERAL PRACTICE AND PROCEDURF

Attempt of Congress to withdraw jurisdiction from courts, see Wright, Miller & Cooper: Jurisdiction 2d

Pleading claim for relief, see Wright & Mille § 1239.

WEST'S FEDERAL FORMS

Complaint to enjoin violations, see § 1663.

WEST'S FEDERAL PRACTICE MANU

Federal Wage and Hour Law, see § 1451 et seq.
Information in criminal action, see § 1451.87.

CODE OF FEDERAL REGULATION

Written assurances, statement of policy, see 29 et seq.

LIBRARY REFERENCES

Offenses and prosecutions under wage and hour regulations, see Labor Relations ⚷1641 et seq.
Offenses and prosecutions under wage and hour regulations, see C.J.S. Labor Relations § 1343 et seq.

§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

To: Steve Brandt

Fm: Jim Sourant

April 2, 1997

Dear Steve,

I need your help. Please have Romney Brain fax us at 907-465-3834 the federal employment statute (or the citation to it) referred to on pages 2-3.

We are informed by the legislative research people that under federal statutes, there can be no punitive or noneconomic damages for pain and suffering, emotional distress, etc. in the context of wrongful employment practices. Experience has taught me that I cannot always rely on their opinions. I need to know who is right pretty pronto.

If anyone needs to call me, please do so at 907-465-4930, since this is official business. I appreciate whatever you can do to assist. If you cannot get me a citation by this afternoon, please disregard this note.

Thanks for all your help,

Jim

Post-it® Fax Note 7671	Date 4.2.97 # of pages ▶ 1
To Steve BRANDT	From Jim Sourant
Co./Dept.	Co. Rep. Porter
Phone #	Phone #
Fax # 360-378-6651	Fax # 907-465 3834

To: Steve Brandt

Fm: Jim Sourant

April 2, 1997

Dear Steve,

Thank you for the materials that we received yesterday. Your efforts underscore even further for the need of tort reform.

The 1991 federal anti-discrimination statutes have opened a pandora's box for the job-creating private sector. The "self-snagging" (original thought, but you can use it if you want) effect of such laws on American industry is putting us at a global competitive disadvantage. Don't let me get started on this........

I fax herewith an important from the March 31 op-ed page of The Wall Street Journal, which you will no doubt find useful in supplementing your message.

I also pass along an editorial from the same newspaper in case you missed it. It is about the American Bar Association's unsurprising opposition to tort reform. Wrongful employment practices are the wave of the future for American tort lawyers, so your book is very timely. One ray of hope is that today only 36% of practicing lawyers in this country belong to the ABA, down from a much higher number from 20 years ago.

Steve, we are really under the gun here from now to May 15th, so I will not be of much help to you. Using my name certainly won't do much to help market your book, but feel free to use my name as a "tort reform activist and retired ~~(recovering?)~~ lawyer." You can attribute the thought that "this book is a life ring to businesses of all sizes faced with the self-snagging effects of current employment discrimination law..." Please massage the thought any way you want, and send me a bill for your time.

Best to you and your clan,

Jim Sourant

Harassment 101: How to Handle Complaints

Manager's Journal

By James B. Mintz

Sexual harassment law demands that executives not only avoid inappropriate words and actions, but also take seriously complaints of harassment by their colleagues, even their superiors. A case in point: Earlier this month CNA Financial Corp. announced the resignation of its top life-insurance executive, Jack Kettler, and his deputy, Robert Teske. Mr. Kettler was accused of making "offensive comments" to two female employees; Mr. [illegible] Teske, of failing to act on the women's complaints.

Equal Employment Opportunity Commission guidelines require employers to investigate complaints of sexual harassment "promptly and thoroughly." Based on a review of relevant court cases and on my investigative work for corporate counsel over the past two decades, here are some practical suggestions for minimizing the legal, internal and public-relations fallout from sexual harassment charges:

• *Move quickly to begin an investigation.* It's tempting to wait until the dust settles, but companies can help protect themselves from liability by starting an investigation immediately—preferably within 24 hours of a complaint. In the case of *Nash v. Electrospace System Inc.*, a federal district judge praised the accused company for wrapping up its investigation quickly. "The investigation and transfer were accomplished within one week of [the plaintiff's] first complaints," the court noted. "Surely this [promptness] reflected a prudent response to an unpleasant situation." An appeals court, upholding the district court's ruling in favor of Electrospace, called the company's response "prompt and sensitive."

• *Interview potential witnesses, as well as people who may be aware of a pattern of harassment.* Such testimony is critical, especially when the alleged harasser denies the charge. And co-workers can provide important corroborating or exculpatory details, such as each individual's demeanor at the time of the alleged act, whether the harasser had the opportunity to commit it and whether there existed a broader pattern of behavior. If the accuser is a young female secretary, for example, an investigator should consider interviewing her young female predecessors.

• *Carefully regulate the alleged harasser's contact with accusers and potential witnesses.* Soon after a female employee of Astra USA filed a sexual harassment complaint against the unit's chief executive, he reportedly called her and asked if she felt her job was "in jeopardy" and if she "felt pressured." Later, the CEO reportedly summoned a female employee to his hotel room, told her he was going to fire another complainant, then directed her to sign an affidavit stating that he had not harassed her. Such overtures are clearly inappropriate, but even routine contact should be minimized or prevented until the situation is resolved. If it's practical, remove both accuser and accused from the workplace, making clear to their colleagues that the separation does not imply any prejudgment but is simply a way to minimize pressure on everyone concerned.

• *Choose the sequence of interviews carefully.* The first investigative step is interviewing the accuser to learn about specific alleged acts, dates and other details. If the alleged harasser is likely to cooperate with the investigation or admit the harassment, interviewing him next could lead to a quick, informal resolution of the situation. But if the alleged harasser is considered hostile and the accuser says there is a pattern of behavior, it's probably best to interview other witnesses first.

• *Conduct interviews far from prying eyes.* While an investigation is in progress, employee interest in who is under suspicion, who is assisting the investigation and what they're saying is always intense. Even an interview's duration may be fodder for office gossip. To limit speculation and preserve confidentiality, conduct all interviews in a private area, preferably off site. Ask all employees, whether interviewed or not, to refrain from rumor and speculation, which can only hurt morale, productivity and the company's public image.

• *Ask for documents and other hard evidence.* In one case I worked on, a series of inappropriate messages in birthday cards from a boss to an employee were an important break in the investigation. Ask the complainant, alleged harasser and witnesses for any documents—notes, hotel receipts and the like—that might corroborate or refute an accuser's claims. Voice- and e-mail messages can also provide concrete evidence that harassment has occurred.

• *Reveal details about the allegation to interview subjects only when absolutely necessary.* A company risks a defamation charge if "raw," unconfirmed information obtained during a sexual harassment investigation leaks.

• *Investigate thoroughly, but don't let investigations drag on.* A major law firm, Baker & McKenzie, challenged the veracity of a secretary who complained about a partner's alleged groping—only to find later that a number of similar complaints had been made against the same partner. In 1994 a jury ordered the firm to pay its former employee several million dollars. In press interviews after the verdict, one juror cited the firm's failure to follow up on the prior complaints. Yet an overlong, overzealous investigation can do as much damage as a perfunctory one. If victims believe that a company's internal resolution process has failed because the investigation drags on, they may go outside the organization to seek satisfaction. That can escalate the seriousness of a situation that could have been resolved had the investigation been completed in a timely manner.

A badly managed sexual harassment investigation can seriously damage any organization—internally, in the courts and in the public eye. But a prompt, thorough, professional investigation can help preserve, even enhance, the credibility of its leadership, the morale of its workers and the value of its stock.

Mr. Mintz runs a corporate-investigation company based in New York and Washington.

TWSJ 3.31.97

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email:brandtsc@gmex.com

STEVEN C. BRANDT, Ph.D.
Senior Lecturer in Management Emeritus

March 27, 1997 ~~VIA FAX~~

Dear Jim,

I think I have mentioned our new book, ***STAY OUT OF COURT & IN BUSINESS:*** *Every Manager's Guide to Minimizing Legal Troubles.* I am working with a Seattle law firm on this important material; we feel it fills a significant, unmet need. As I recall you seemed to respond to the concept with interest. I am wondering if you would be willing to take a look at a few of the finished chapters with an eye to providing a testimonial that we might include on the cover or in other promotional materials? On the chance that you will say, Yes!, I am enclosing two chapters. (Maybe Porter would be interested too.)

The book (table of contents also enclosed) is aimed at managers of going-concerns, in general. And I personally think every corporate director should inhale the chapters. I have been on three public boards, and I didn't really know this legal, operating material. So, like everyone else, I was dependent on an attorney. And often, he/she wasn't a business person.

If your time doesn't permit, no sweat. (I wanted to fax you first for an o.k., but Joey said "no fax.")

Best regards,

Steve

Steve

SAMPLE TESTIMONIALS FOR: ***Stay Out of Court & In Business*** *by*
STAFFORD FREY COOPER & Steven C. Brandt

FAX 360 378 6651

Circle one or more you find comfortable; make any modifications you wish. Or compose a custom testimonial of your own in the space at the bottom.

1. The first practical book I have seen on this vital, even strategic, subject. Terrific. HIGHLY recommended.

2. At last, a realistic approach to dealing with legal threats. This book is a must for anyone in business, starting with corporate directors.

3. Crisply covers the main areas in which problems arise. Gave me the right questions to ask, for a change. Refreshing.

4. Excellent coverage of a touchy subject. Easy to read, even interesting.

5. This book would have saved me a lot of time and trouble. I wish it had been published two years ago.

6. Managing a growth company is complicated enough without legal problems. This book is a wonderful primer for busy people.

7. Told me exactly what I needed to know on very important subjects for my company. I am giving a book to every one of my managers.

8. A valuable combination of basic legal knowledge and business understanding. This is an important book.

9. Great read. I never thought I would enjoy getting up to speed on legal issues that affect our company. This book is going to be money in the bank.

10. The material here will add to our competitive advantage. I hope my competitors don't pick up the book!

11. I am amazed at what I didn't' know. This book is solid gold.

12. Building a company? Better read this.

13. Legal issues covered in English. What a relief. I believe this book ought to be mandatory reading for every MBA and entrepreneur in the Country.

14. This small book speaks volumes. I think it will save us hundreds of thousands of dollars over the years ahead.

15. The contents cover what business people need to know. We have to live with the law of the land. This books tells how to do it.

16. Great preventive medicine. This book is going to make a difference.

17. Business people like myself need to stop fighting the law and use it to enhance their company's competitive advantages. This book points the way.

18. A lot of business people complaint about attorneys. This book has practical steps for reducing the time spent with them!

19. Comprehensive and readable. I am recommending this book to all my clients. (Lawyer or CPA)

20. Litigation has gotten out of hand. This book will help redress the balance. I found it of immense value and will use it throughout my company.

21. A practical, very readable book on an essential subject that effects every business in the land every day.

22. This is an outstanding book for every company director....and busy manager.

23. Custom quote: ____

____

Stay

Out of Court

and

In Business

Every Manager's Guide to Minimizing Legal Troubles

by
STAFFORD FREY COOPER
&
Steven C. Brandt

48° 44' 00"N
123° 15' 00"W
122° 44' 00"W
48° 24' 00"N
Archipelago Publishing
Friday Harbor Washington

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DRAFT

ABOUT THE AUTHORS

STAFFORD FREY COOPER is a law firm based in Seattle, Washington. The firm was established in 1905 and today it serves a diverse client base made up of manufacturers, retailers, wholesalers, and individuals. The members of the firm who served as the primary authors of this book have extensive experience in all phases of legal practice in a cross-section of industries ranging from software to clothing. They have prepared *Stay Out of Court & In Business* to provide practial guidance to people who are busy building companies. The attorneys are:

J. William Ashbaugh
Mikhael C. Bolasina
Romney R. Brain
Meredith Dorrance
A. Richard Dykstra
Michaelanne Ehrenberg
Thomas M. Fitzpatrick
Kenneth Hobbs
Larry E. McMullen
William L. Neal
James T. Yand

1-206-623-9900

Steven C. Brandt assisted in the preparation of the book. He is an experienced entrepreneur, company president, author, company director, and faculty veteran of 21 years at the Stanford University Graduate School of Business in the heart of Silicon Valley. At Stanford he taught New Enterprises, Business Strategy, and Small Business Management to over 4,000 executives and MBAs during the '70s, '80s, and '90s. Brandt has BSME, MBA, and PhD degrees and he has written three popular business books–*Entrepreneuring in Established Companies, Entrepreneuring: The Ten Commandments for Building a Growth Company,* and, most recently, *Focus Your Business: Strategic Planning in Emerging Companies.* He also has a video series entitled, *Managing the Emerging Company.*

DRAFT

TABLE OF CONTENTS

DRAFT

Quote: fgfdg fgfdg gtgrifpgg fg

Chapter 1

EMPLOYMENT DISCRIMINATION

Overview

It is virtually impossible for an employer to ever actually "win" an employment discrimination lawsuit when all the costs involved are considered. Such suits are usually disruptive to the ongoing life of a business, expensive to defend, and generally an unpleasant experience for everyone involved--from employees to supervisors to managers and executives. The only practical way to win in the area of employment discrimination is to conduct your business in a way that makes claims obviously frivolous in the first place.

Many people in management do not acquire a working knowledge of the law governing employment discrimination until a charge is filed with the EEOC (Equal Employment Opportunity Commission) or their company (and sometimes they, themselves) are sued. The horse is out of the corral at this point. The key to minimizing legal troubles on discrimination is a pervasive knowledge of the law, a steady, even compliance across an organization and over time, and thorough documentation. This can be accomplished by knowing the law, following the law, and committing your personnel-related activities to paper to create an evidence trail of your knowledge of and adherence to the law. There are two other chapters in this book that relate to employment discrimination: Chapter 2 on Workplace Sexual Harassment and Chapter 3 on Employee Handbooks.

The Law of the Land

The law pertaining to employment discrimination is complex. It differs from one federal circuit (geographic area) to another, from state to state, and from city to city. Therefore, There are potentially at least three overlapping laws (federal, state, and city) that may apply to any given employer in a particular circumstance. This chapter will provide you with a general overview of the law with a special emphasis on federal law because it is the senior law of the land [true?] and it applies to most businesses across the country.

At-Will Employment. The general rule in the United States is that employees who do not have written employment contracts are considered "at-will" employees. With at-will employees, an employer can terminate, demote, promote, or change the terms and conditions of the employment, with or without notice, and with or without cause. **The laws prohibiting employment discrimination constitute a major exception to the doctrine of at-will employment.** Under laws enacted by Congress and virtually every state in the United States, *it is unlawful for an employer to take adverse action against an applicant or employee that is motivated by the applicant's or employee's status as a member of a protected class.* Examples of adverse action can include termination of an [a longtime?] employee, refusal to hire an applicant, and less favorable treatment an employee with regard to pay, bonuses, promotions, or other terms and conditions of employment.

Protected Classes. What are the protected classes? They are identified by federal statutes, state statutes, and local ordinances. Under Title VII of the Civil Rights Act of 1964 [correct?], it is *an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, or sex.* [Make sure this quote is correct.] Under the Age Discrimination in the Employment Act of.... [is this a different act? If so, name, date...], *employees between the ages of 40 and 70* [quote valid?] are designated as a protected class. The American with Disabilities Act [is this a different act? If so, name, date...] protects *people with handicaps or disabilities (including HIV+ status) who can perform the essential functions of the job with reasonable accommodation.* [quote valid?] Some state statutes and local ordinances include sexual orientation and marital status as protected classes. The laws against employment discrimination do not protect only minorities. For example, Caucasians receive the same protection from Title VII as racial minorities, and, absent a legitimate affirmative action program, they may sue if race was a motivating factor in an employment decision. In summary, managers should be alert that they do not make employment decisions based on a person's...

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Handicap or Disability (in certain instances)

Jurisdictional Limits. The federal anti-discrimination laws do not apply to small employers. Under Title VII and in the Americans with Disabilities Act, an employer must have **at least fifteen employees** for the statutes to apply. Under the Age Discrimination in Employment Act, the employer must have **twenty** employees. State versions of the federal anti-discrimination laws have their own jurisdictional limits but most are similar to the federal thresholds. [true???]

Damages. Prior to legislative amendments in 1991, the only remedies that a successful, aggrieved party ("plaintiff") could obtain for a proven violation of Title VII were equitable in nature. For examples, the plaintiff might receive back pay, reinstatement to a lost position, front pay if reinstatement was not available or appropriate, and the payment of reasonable attorney's fees and costs. In addition, the ADEA [what do these letters stand for????] provided for liquidated damages [definition?] if the employer's violation was found by a jury to be "willful." It was (and is) also possible for a court to impose other types of injunctive relief, such as requiring a company to instruct all managers or employees in non-discriminatory employment practices.

In 1991, our elected Congress amended the anti-discrimination statutes to authorize a broader range of remedies. Today successful plaintiffs are entitled to all the remedies identified above, plus the full range of compensatory damages previously available in personal injury litigation. This means that juries and courts [???] may require employers to pay for lost future earning capacity, emotional distress and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Plaintiffs may also request punitive damages when the conduct of the defendant is sufficiently egregious to warrant them. Unlike compensatory damages, which are intended to compensate the plaintiff for any emotional or pecuniary loss, the purpose of punitive damages is to punish the defendant and to make the defendant serve as an example for others. Under the federal employment discrimination laws, the total of compensatory and punitive damages are limited as follows:

Number of Employees	Damage Limit
15-100	$50,000
100-200	$100,000
200-500	$200,000
500+	$300,000

The state and local versions of Title VII provide similar rights and remedies.

Individual Liability. It is common for plaintiffs to name owners, managers, and supervisors as separate defendants in employment discrimination cases. Most--but not all--federal courts that have addressed the issue have ruled that only the corporation/employing entity is subject to suit for employment discrimination. The state counterparts of the federal legislation may authorize individual liability, depending on the language of the statute and the interpretation of that language by the state courts. Needless to say, the stress of a lawsuit is compounded when managers and supervisors have to worry about their individual assets being at risk.

In summary on the law of the land, and repeating the point made at the start of this chapter, it is difficult to every really "win" a suit involving employment discrimination. Far better to prevent it.

Types of Employment Discrimination Claims

Disparate Treatment. The most common claim made against businesses is for dissimilar ("disparate") treatment. An employee or potential employee claims that an employer treated her or him unfavorably or less favorably because of her or his membership in a protected class. For example, a male employee might allege that his employer promoted others over him because of his religion. Disparate treatment claims can be made by individuals, groups of people, or via a class action in which one person or a small group presumes to speak for a larger group as a whole. [is this descrption of class action O.K.?]

In a disparate treatment case, the ultimate question is whether the person making the claim's membership in a protected class was a factor in the adverse employment decision. Under federal law, the question that would be put to the jury is whether or not the person's membership in a protected class was a "determining factor" in the adverse decision. Some states use a lower standard than the federal law. Such states say an employer is liable if the person's membership in a protected class was a "substantial factor" (rather than a determining factor). In these kinds of cases, an employer must make its case by demonstrating a legitimate, *non-discriminatory* reason for the adverse decision, e.g. why the person was fired, or not hired, or demoted, or not promoted. **Solid documentation regarding substandard performance** [or qualifications????] is the best way to demonstrate non-discriminatory reasons for adverse decisions.

Disparate Impact. In a disparate impact case, a person challenges a presumably neutral policy or requirement by alleging that the effect of the policy or requirement has an adverse impact on a protected class and that the policy or requirement is **unnecessary for effective performance** of the job. For example, the employment requirement of a minimum height for firefighters was challenged [199X?] to the effect that the policy excludes a disproportionate number of women because they tend to be shorter than men. Further, the challenge included material to show that the height requirement was and is not necessary for effective performance of the job. [footnote citation here?] Although the height policy or requirement appeared neutral on its face, the requirement was deemed unlawful by the courts because its effect was discriminatory against a protected class. As a practical matter, disparate impact claims are quite rare in recent years.

Reasonable Accommodation. Employers have a legal obligation to show some flexibility with regard to a person's religious beliefs or disabilities. If an employee or potential employee can perform the "essential functions" of a job with "reasonable accommodation," then it is unlawful to discriminate against the person because of these factors. Determining what is an essential function and what constitutes reasonable accommodation are job-specific inquiries. For example.... [Could we have two examples here??? One which an employer won; one which an employee or potential employee won.] [Also, what is the situation today regarding mental handicap issues? Is this an emerging area of activity? Recent case?]

Retaliation. Federal law and most state laws prohibit an employer from retaliating against an employee who complains about discriminatory employment practices. Forms of retaliation include.....?????. For example, the courts in XYZ found that...???? Also, it is important to note that a person can still seek (and win?) recovery for retaliation even if it is found that the person's original complaint (that precipitated the retaliation) was without merit.

In summary on the types of claims, disparate impact is the most common claim made against businesses. However, although the basis of a particular claim may be employment discrimination, aggrieved, at-will employees also regularly include other issues such as breach of oral contract, breach of promise, breach of inferred promise ("promissory estoppel") [Mike: Is this O.K..?], wrongful discharge, violation of public policy, and intentional or negligent infliction of emotional distress. These subjects are usually governed by state law.

The EEOC (Equal Employment Opportunity Commission)

In order to pursue a claim based upon the federal anti-discrimination statutes, the initiating party must first file a formal charge with the EEOC. The deadline for filing a charge is 180 days after the last occurrence of alleged discrimination. The deadline date is relatively easy to calculate in the case of a job termination or the non-issuance of a job offer; it is more difficult to calculate when it involves a continuing violation of some kind. Once a charge is filed, the EEOC may or may not investigate. Sometimes it will; other times it will wait 180 days and issue a right-to-sue letter to the initiating party. That party cannot file a lawsuit alleging a violation of a federal anti-discrimination law until after it has filed a timely charge with the EEOC and received a notice of her or his right to sue. If the person suing goes to court without having received such a notice, there is grounds for a dismissal of the claim by the court.

If the EEOC decides to investigate, the intensity of its investigation will vary dramatically depending on the assigned investigator's workload and the publicity appeal of the claim. **It is difficult to predict what the EEOC will do.** Normally an employer will be given the opportunity to respond in writing to a specific charge and provide documentation in support of its position on the matter at hand. The EEOC may then contact witnesses and subpoena documents.

Should an employer use a lawyer or a human resource professional during the time a charge is pending before the EEOC? It depends. An employer needs *someone* knowledgeable about employment discrimination law to draft a response to the charge and otherwise cooperate with the EEOC's investigation if there is one. The key is to work with the EEOC in such a way as to ensure that you do not prejudice any subsequent litigation or otherwise limit your range of solutions to the charges.

Individual states may have their own agencies which have their own requirements. Such agencies, if they exist, will often work in conjunction with the EEOC to process and investigate claims.

How To Minimize Your Legal Troubles

The intent of the law is to make people who employ other people base their decisions about employees and potential employees on performance considerations, not membership in a class of people. Separating on-the-job performance--potential or actual--from other human factors (e.g. effort, interest, appearance, compatibility, etc.) is not an easy task in many, if not most, business situations. Informed, vigilant managers are required. And documentation.

1. Stick to Job-Related Inquiries When Evaluating Applicants.
Make sure both your application forms and interviewers avoid asking questions or inviting answers that have the effect of identifying applicants who are members of a protected class. For example, a question that leads to the disclosure of the club(s) to which an applicant belongs can lead to a later claim. The general test should be: **Is the information requested necessary to judge an applicant's competence or job qualifications?** Here are the basic guidelines about what can and cannot be pursued during an interview or on an application:

•Do not seek information on an applicant's marital or family status, including family planning decisions, child care arrangements, or people to contact in event of an emergency. You can ask if the applicant was ever known by another name (so you can do reference checks), or whether the applicant has a relative who is employed by the company (if you have an anti-nepotism policy). You can ask how long the applicant plans to stay on the job and about his or her attendance record in past jobs.

•Do not pursue information regarding religion, religious holidays or practices, national origin, parents' national origin, appearance, foreign language proficiency (unless it is necessary for the position), any disability, or any handicap. A spirited debate on religion might be very stimulating, but it is definitely forbidden territory in an employment interview setting.

•You can describe the requirements of a subject job (days, hours, duties), and inquire generally whether the applicant can perform the job "with or without reasonable accommodation." [where is the quote from? The law??] The EEOC recommends that the issue of accommodation not be addressed until after you have decided to offer the applicant a position. At that point the EEOC suggests that you make an offer conditional on the candidate's ability to perform the essential functions of the job.

In essence, to minimize legal troubles connected with hiring, you are well advised to stick to an applicant's ability to perform the duties of the job in question.

2. Establish and Use A Probationary Period for All New Employees.
While the laws against employment discrimination protect employees during a probationary period, such a period provides an opportunity for managers to systematically evaluate actual performance in the workplace. Appropriate action can then be taken early in the employment relationship with employees who do not meet the standards for the position. Moreover, an employee who is terminated during a probationary period is less likely to file a claim than one who has been employed for an extended time. When you have a probationary period, it is important that *all* new employees be subject to it and that a record be kept of each person's progress and evaluations while on probation.

3. Maintain and Use a Comprehensive Employee Handbook.

Experience indicates that both employees *and juries* respond positively to the presence of manuals that spell out key processes affecting employees. For example, when managers and supervisors follow a system of progressive discipline that is in writing for everyone to see, it is more likely an employee can correct minor problems before they boil over into major ones and termination. A proper employee handbook should set forth expectations regarding job performance and provide for recourse when those expectations are not met. A handbook should also set forth a procedure by which complaints of discrimination can be investigated and handled internally in a fair and impartial manner. **Because some states will enforce as written the terms of an employee handbook, the particular language used should be chosen with great care.** Employee handbooks are discussed in detail in Chapter 3.

4. Conduct and Document Regular Performance Reviews.
To minimize your legal troubles, your company should have a formal process of employee evaluation. It should *require* supervisors, managers, and executives to honestly and objectively appraise each of their peoplein terms of job-related strengths and weaknesses. The process should also help evaluators identify ways in which individuals can improve their performances. This is simply good business, and many organizations do conduct periodic assessments. Where many companies fall down, however, is in documentation, particularly documentation about poor performers.

The importance of putting performance problems down on paper can not be over-emphasized. For example, suppose a company must lay off employees in a reduction in force. When this happens, the door is opened to mass litigation against the company because those selected for layoff will often believe (or, at least, claim) they have been singled out for reasons unrelated to their performance, e.g., age. If you have documentation that shows that the people who were selected for layoff were the less stellar performers in the company, you will have a positive case to present to the EEOC (and perhaps, later, to a jury). You will have evidence that your employment decisions were based on performance and merit, rather than on membership in a protected class.

Here is another example. Suppose you terminate a member of a protected class and he or she seeks help from an attorney. It has been known to happen. The first thing most plaintiff's attorneys will do is ask to see their potential client's personnel file. They will often do this before agreeing to take a discrimination case. If there is no file, the attorney knows her or his odds of winning the case are improved. If there is a file and it contains only positive performance evaluations, she or he will know that you may well have a difficult time persuading either the EEOC [true???] or a jury that the terminated employee deserved to be terminated. On the other hand, if there is a file and it identifies weak performance and/or other work-related problems over time, the attorney may well decline to take the case.

Start documenting a performance problem as soon as it arises.

5. Use Severance Agreements Selectively. [Romney and Mike: I have changed the tone from your draft here to make this item more proactive...rather than just responding to a possible threat. See what you think. scb]

Sometimes it becomes necessary to terminate an employee who is a member of a protected class and who is a borderline or gray-area case in terms of adequate performance. You recognize that the employee has the potential to make a troublesome claim--they may even have threatened, either expressly or implicitly, to file suit. In this case, you should consider negotiating a severance agreement with the employee that will offer him or her "consideration" (see Chapter 7 on Contracts) in exchange for a release agreement. In a typical release agreement, the employee agrees not to pursue any claims of discrimination against you. While you may blanch at the thought of paying severance to a borderline performer, you may wish to at least look at the economics. The cost of defending a claim in this circumstance may well be much greater than the cost of obtaining a release agreement at the time of the termination.

In this regard, employees between the ages of 40 and 70 have special rights when it comes to severance agreements. Under the Age Discrimination in Employment Act, any release agreement must include an express reference to the Act, a 21-day period in which to review the agreement before signing it, and a 7-day period to revoke the agreement after signing it.

6. Consider Insurance to Cover Your Employment Practices.

Some insurance companies now sell policies that cover the costs involved in claims and lawsuits alleging employment discrimination. This type of insurance is relatively new, and, if available, it is a way for you to pass off some of your risk of being in business to a third party, the insurer. Since insurance companies deal with many claims from a variety of sources, they should have broader experience with employment claims than any specific operating company. Their potential participation with you may justify the cost of the premium involved. In some cases you may have or be able to obtain employment practices coverage under your Comprehensive General Liability, Errors and Omissions, Umbrella, or Homeowner's policies. As suggested in Chapter 5 on Risk Management, it is important to know what your existing policies do and do not do for you.

7. Check Your Employee Headcount.
Whenever an employment discrimination claim is filed or threatened, you should determine whether you have the minimum number of employees required in the statutes that are alleged to have been violated. The earlier this defense is raised, the quicker and easier the claim may disappear.

Conclusion

There is no ironclad way to ensure that your company--and perhaps, you-- will not be sued for employment discrimination. There are steps you can take, however, to reduce the chances it will happen. Under the law of our land, employers retain the discretion to hire or fire "at-will" employees for any reason or no reason at all. The EEOC and juries do not accept that employers will use that discretion capriciously, however. Policies and practices such as those outlined above will help you prevent or defuse employment discrimination and claims thereof.

END 25000

QUOTE: XYZ Co. hit by lawsuit. WSJ

DRAFT

Chapter 2

WORKPLACE SEXUAL HARASSMENT

Overview

Sexual harassment litigation has exploded in recent years. The explosion is due primarily to the passage of the Civil Rights Act of 1991 and an increased and increasing public awareness of sexual harassment in the workplace. The 1991 Civil Rights Act allows people who claim they are victims of sexual harassment (plaintiffs) to request jury trials. The Act also allows the plaintiffs to seek both compensatory and punitive damages from the defendants which in most cases are companies. Publicity, jury trials, and the widening array of damages being handed down in the courts in recent years may be encouraging employees with sexual harassment claims to pursue them by initiating litigation. In earlier times such employees might have chosen to remain silent or to pursue less litigious avenues of relief or satisfaction.

Many employers are responding to the challenge. In general, such employers adopt anti-harassment policies and provide training designed to eliminate sexual harassment incidents in the workplace. In spite of such policies and training, the litigation boom continues to grow. **Recent state and federal court decisions make clear that it is insufficient for employers simply to draft anti-harassment policies and investigate internal complaints.** Rather, to protect their companies from liability, employers must aggressively enforce stringent anti-harassment policies and take prompt remedial actions for transgressions. Even after instituting an anti-harassment policy, employers must demonstrate an **executive and managerial attitude** of **zero tolerance** for violations as a show of their commitment to the company policy. The actions outlined below are means of instituting and effecting anti-sexual harassment policies.

The Law of the Land

Title VII of the Civil Rights Act of 1964 says that it is *an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . . .* Sexual harassment is classified today as one form of discrimination, and the definition of what actually constitutes sexual harassment continues to evolve in our legal system. As litigation on the matter increases in volume across the country, courts are identifying behaviors that fall within the legal definition of sexual harassment. The courts are also identifying behaviors that are not considered sexual harassment, i.e., behaviors that withstand scrutiny under a reasonableness standard. As an increasing number of types of workplace behavior are found to fall within the sexual harassment boundary, employers are generally well served by being aggressive in an attempt to both prevent and correct sexual harassment incidents. The more vigorous the programs, the better the chances of avoiding liability.

Types of Sexual Harassment Claims

General Harassment. Traditionally, Title VII litigation required that sexual harassment claims rest upon sex and sexual conduct. Recent judicial decisions, however, have enlarged the range of incidents which can be used as the basis for a harassment claim. For example, an allegation of gender-based animosity will now sustain a sexual harassment claim. This means that harassing, abusive, and crude remarks may constitute sexual harassment even though a manager or supervisor directs the comments to all of his or her employees, both male and female. **Where a manager's or supervisor's conduct is so severe and pervasive that it alters the conditions of employment and creates a hostile, abusive work environment, a court may sustain the claims of a sexual harassment plaintiff.** 1 In addition, the law recognizes that male employees may suffer sexual harassment at the hands of female co-workers or managers. Male plaintiffs have successfully sued their employers for sexual harassment by their female supervisors. 2

Same-Sex Harassment. With respect to same-sex harassment, the courts differ about whether Title VII prohibits same-sex harassment. One federal court held that a male supervisor's harassment of a subordinate male employee was not actionable, despite its sexual overtones. 3 The court reasoned that Title VII seeks to eradicate an atmosphere of oppression by a dominant gender, not by the same gender. Other federal courts, however, hold that Title VII is not limited to heterosexual harassment and that same-sex harassment is actionable under Title VII. 4 Individuals may regard sexual advances as unwelcome regardless of the offender's gender. Further, state courts have permitted plaintiffs to pursue same-sex harassment under state law. 5

Harassment based upon sexual orientation, however, is not actionable under Title VII. Courts reason that Title VII prohibits harassment on the basis of gender, not sexuality. Harassment of homosexuals and lesbians is potentially offensive toward men and women in equal measures. Therefore, harassment of lesbians and homosexuals because of their sexual orientation does not qualify as gender discrimination actionable under Title VII. 6

Quid Pro Quo Harassment. The law recognizes two forms of sexual harassment for which an employer may be liable. The first is quid pro quo (one thing in return for another) harassment. This type of harassment occurs when either (1) unwelcome sexual favors are a condition of one's employment; or (2) unwelcome sexual favors are sought by threatening or actually causing a tangible detriment to one's job. Employees generally assert quid pro quo claims against managers or supervisors when they find themselves forced to choose between submitting to a manager's or supervisors' personal demands and the loss of job benefits, promotions, or employment. Most courts that have dealt with quid pro quo sexual harassment claims **have held the employers involved to be strictly liable on public policy grounds**. In general, when management people are found to have abused their authority, employers are declared liable because they were the best suited to prevent such abuse.

Until recent years, courts required quid pro quo harassment plaintiffs to demonstrate that they suffered tangible economic detriment as a result of their manager's or supervisors' unwelcome sexual advances. Recent court decisions, however, indicate an erosion of the "economic harm" element. One federal court held that a quid pro quo plaintiff need only show a "threat" of economic harm, rather than actual economic harm. 7 Another court found that a supervisor's threat to make life difficult for the plaintiff if she did not resume a relationship with him constituted a detriment to the plaintiff's terms or conditions of employment. Because the supervisor linked non-hostile working conditions to acceptance of his sexual advances, he was harassing her in a quid pro quo manner even though she did not suffer actual economic loss. 8 The disintegration of the economic harm element has reduced the burden of proof (?) on the plaintiff's in quid pro quo harassment suits.

CASE A: Patricia Apple was employed as a waitress at Hungry Hanks Bar & Grill. Hank's was owned and operated by Big Joe Enterprises and managed by Donald Spam. While working at Hanks, Apple was subjected to continuous sexual harassment. The harassment consisted of unwelcome sexual comments and physical contact from Spam. At one point Spam offered Apple two hundred dollars of his own money to have sex with him. Some time after she refused Apple noticed that her hours of work were decreased. Another time Spam suggested to Apple that she could become an assistant manager at Hanks. The offer, however, was linked to Apple's acquiescence to Spam's personal proposals. Apple refused again; she did not receive the promotion. Soon thereafter she did not receive an anticipated salary increase. Spam indicated that she did not receive the raise because she refused to have sex with him. Apple filed suit against Spam and Big Joe. The court held that Big Joe was strictly liable for the quid pro quo harassment perpetrated by Spam and awarded monetary damages to Apple.

In CASE A the court held the corporation strictly liable for the sexual harassment by its manager, Donald Spam. The decision was justified because the manager relied upon the actual or apparent authority inherent in his supervisory position within the company to extort sexual favors. Because the employer vested actual or apparent authority in the manager, the employer was held to be strictly liable for the misuse of that authority.

Hostile Work Environment Harassment. The second form of harassment for which employers may be liable has to do with the general work environment. To establish a sexual harassment claim in this area an employee must demonstrate three things: (1) That a supervisor or co-worker made sexual advances, requested sexual favors, or engaged in physical conduct of a sexual nature. (2) That the conduct was unwelcome. (3) That the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. In addition, in assessing whether a workplace environment qualifies as hostile, courts usually look at factors such as the frequency of the discriminatory conduct, the severity of the discrimination, whether the offender physically threatened the complainant or uttered offensive statements, and whether the conduct unreasonably interfered with an employee's work performance. Incidents that are relatively trivial or isolated will typically not lead to a finding of employer liability for a hostile work environment.

CASE B: A male employee at a manufacturing plant frequently used sexually explicitly language around a female co-worker and frequently touched and fondled the female co-worker. The female employee lodged complaints with the plant supervisor. The supervisor took no action for several months and the harassing conduct continued. Finally, the male worker was transferred to a different shift. Other male employees, however, continued his course of intimidation. The woman finally resigned from her position and filed suit against the employer.

In this case the court found that the female had established the requisite elements of hostile work environment harassment and awarded monetary damages. The harassment was unwelcome; the employee was singled out and suffered the harassment as a result of her gender and the harassment was sufficiently severe and pervasive as to alter the conditions of employment and create an abusive working environment. The court held the employer responsible because the employer knew about the harassment, but failed to take reasonably prompt and adequate corrective action.

While most hostile work environment lawsuits are aimed at unwelcome conduct that occurs within the confines of the workplace, some lawsuits have to do with conduct between employees outside the workplace. For example, recent cases have included incidents which occurred at out-of-town business conventions and at after-hours social gatherings. An employer's liability for situations involving off-premises conduct is not automatic. The law remains unsettled as to when and if a hostile work environment can include events outside the normal work place. While intuitively it might seem that off-premise conduct lies outside the realm of employer responsibility, off-premise work may be inextricably entwined with job-related responsibilities. To guard against liability for any such harassment, employers should make sure their written policies cover off-premises work. Then, employers should treat complaints involving off-premise incidents with the same seriousness given to other complaints of sexual harassment.

To summarize on hostile work environment claims, when an owner, manager, partner, or corporate officer is found to have personally participated in the harassment, courts automatically impute the harassment to the employer. On the other hand, when an employee's co-worker perpetrates the harassment, an employer will be liable only if the complainant demonstrates that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective measures. Courts hold that employers had actual or constructive knowledge of the harassment if the complainant either registered a complaint at the managerial level or the harassment was so pervasive that the employer should have known about it. An employer will be liable for such harassment if it fails to take remedial action reasonably calculated to end the harassment.

How To Minimize Your Legal Troubles

The intent of the law as it is being interpreted in the courts over time is to reduce to zero the incidents of sexual harassment people encounter in the course of their employment. To comply with the law, employers need to proactively seek to eliminate sexual harassment within their organizations. Following are six basic actions business leaders can take to stay in compliance with both the spirit and letter of the law of the land.

1. Set Expectations. Write and Maintain a Written Anti-Sexual Harassment Policy.

The creation of a written anti-sexual harassment policy is big step toward setting the stage for desired behavior. The written policy should explicitly define and prohibit sexual harassment, explain the procedures for filing a complaint with an independent representative of the employer, and encourage the prompt reporting of all complaints. The policy should contain assurances that all complaints will receive thorough, impartial investigation and resolution; that investigations will remain confidential to the extent consistent with an employer's obligation to investigate; and that all personnel, including executives, managers and supervisors, are equally subject to the policy.

2. Broadcast Expectations. Let Every Employee Know What is Expected.

An anti-sexual harassment policy loses its effectiveness quickly if the only copy of the policy is buried in the personnel manager's desk! Employers need to ensure the wide dissemination of the policy—first to existing members of the organization, and then to new people coming aboard. Experience shows that compliance with policy provisions and the effective utilization of incident reporting procedures depend upon employees' familiarity with the policy. Copies of the policy should be included in personnel manuals (see Chapter 4); copies can also be posted on employee bulletin boards. Some progressive firms include mention of the policy in their in-house newletters.

3. Establish Crisp Reporting Procedures.

An effective reporting system will enable employees to present their complaints and concerns to their employer quickly and without fear of retaliation. **Trust is an essential factor in implementing an effective reporting procedure.** Employees will not report claims if they believe they will face ridicule, inaction, or retaliation. Fostering trust requires leadership that includes an open, sympathetic ear for employees with harassment claims. More specifically, experience across a cross-section of companies indicates that it is best to identify more than one individual to whom employees can report complaints. In addition, it seems to be productive if there are several channels for complaints such as in person, after hours, via suggestion box or interoffice mail, or at staff meetings. For cases in which the designated individual or an immediate supervisor is the offender, the company needs to institute a procedure for bypassing those individuals. Some companies appoint an outside individual, such as a director or the firm's outside legal counsel, to serve as an alternative vehicle for registering harassment concerns. An employer should treat verbal and written complaints with equal seriousness.

4. Investigate Complaints.
Upon receiving a complaint, a designated and properly-qualified individual should promptly investigate the situation. The investigator should guard against conducting the investigation as an inquisition. Rather, the investigation should proceed as a fair and impartial fact-finding process that leads to an objective decision. The employer should consider using two interviewers during the investigation: one to interview the complainant, alleged offender, and any other necessary witnesses, and one to note the facts as they emerge during the interviews. The interviewers should not presume the guilt or innocence of either party until they have concluded the investigation. Throughout any investigation all parties and witnesses should feel confident that they will not face retaliation for participating. The interviewers (and employer) should seek a fair and impartial investigation and resolution. What is done should appear fair and impartial to outside observers. Employees who receive square treatment are less likely to later file a lawsuit.

If the investigation is inconclusive, the investigators might wish to inform the accused employee that appropriate disciplinary action will follow the discovery of additional information. The accused employee should be aware that retaliation against the complainant will result in disciplinary action. The employer or investigator should periodically check with the complainant to ensure that the harassing conduct has ceased and that the employee does not perceive that he or she has been the victim of retaliation.

Prior to issuing a disciplinary decision, the employer should provide the accused employee an opportunity to be heard and to present rebuttal evidence. By providing all the parties with minimum "due process" safeguards, employees are more likely to feel that they have been treated fairly. If the investigation reveals that offensive conduct did occur, the employer should take prompt remedial action designed to stop future harassment. The discipline of the offender should match the severity of the conduct. Depending upon the nature of the harassment the remedial measures could range from a verbal warning to counseling, suspension, transfer, demotion, or termination.

5. Conduct Anti-Sexual Harassment Training.
Anti-sexual harassment training is an essential supplement to a written policy. A written policy alone may prove ineffective in defining harassment. A portion of the people in almost any business organization usually require concrete examples of appropriate and inappropriate conduct. Proper training provides an opportunity to demonstrate and discuss the propriety, or impropriety, of specific workplace behavior. For example, some employees might be unaware that certain conduct, such as sexually-explicit language, touching, and off-color jokes, is offensive to particular co-workers. Discussions, which can be a part of the training sessions, allow employees to voice their discomfort with particular behavior. Training sessions give the trainer a chance to explain the law and encourage employees' cooperation and understanding. For example, new or untrained employees might be unaware that their conduct violates the law of the land. One other important benefit of training is that employees' questions may expose potential problems. Then an employer can take corrective action before little problems grow into big ones.

A final word on training: Periodic repeat sessions reacquaint employees and managers with the issue of workplace sexual harassment. By the issue out in the open, employees are less likely to engage in prohibited conduct and employers are less likely to face lawsuits and liability. Such training sessions also reaffirm an employers' commitment to the anti-harassment policy and to the employees' welfare in general.

6. Stay Current.
The definition, nature of, and liabilities for sexual harassment conduct is evolving over time as complaints, claims, and lawsuits wind their way through our judicial system. People building businesses are wise to take steps to remain abreast of developments in both state and federal courts.

Conclusion

Reducing the risk of lawsuits and liability is just good business. Employers need to be vigilant in their attempts to eliminate sexual harassment incidents across their organizations. Leadership backed up by written policies and training are the best tools for achieving this end. Sexual harassment—or claims thereof—are embarrassing to everyone involved. And they are disruptive. Morale, productivity, and self-esteem all take hits.

A growing body of federal case law confirms that employers may avoid liability for the acts of individuals by taking action to eliminate harassment. In addition to publicizing and disseminating a strongly-worded, anti-sexual harassment policy, employers need to institute effective reporting and resolution procedures. Then they must act resolutely on complaints. Employers may successfully insulate themselves from liability by promptly investigating claims and responding with remedial measures designed to deter future incidents of sexual harassment.

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Focus Your Business:
Strategic Planning in Emerging Companies.
by Steven C. Brandt

FLAME OUT! It is not unusual to read about companies fading away after they enjoyed dramatic success stories. It takes a lot of discipline to fix things before they break. This new book by noted Stanford University business professor and management educator Steven C. Brandt is about discipline. It is a roll-up-your-sleeves guide to managing growth and complexity. *Focus Your Business* will show you how to refine your expectations and prune your business in order to keep on succeeding. This book provides details on proven strategic planning techniques, including many short case examples and illustrations.

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"Excellent. Covers the whole range of positioning issues faced by management teams."

-Stuart R. Foster, retired CEO, US Bank of California

About the Author

Steven C. Brandt is an author, experienced entrepreneur, and faculty veteran of 21 years at the Stanford Graduate School of Business. There he taught New Enterprises and Business Strategy to over 4000 executives and MBA's. He has been a director of three public companies, co-founder/CEO of four growth companies, and a direct participant in the development of over twenty new businesses. A sought-after speaker and consultant to companies of all sizes, he has helped thousands of people build their businesses.

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matters on file in this case, and after careful consideration of relevant principles of law, the Court grants the motion of the California State Board of Accountancy to dismiss with prejudice; and, additionally, on its own motion, dismisses the plaintiff's First Amended Complaint with prejudice against the other named defendants, to wit, the Department of the Treasury of the United States of America and John J. Corcoran, County Clerk and Clerk of the Superior Court of California, County of Los Angeles, for the following reasons:

(1) Plaintiff's First Amended Complaint fails to state a claim upon which relief could be granted against the defendant Department of the Treasury because (1) the decision of the Department of the Treasury to disbar the plaintiff from practice before the Internal Revenue Service is clearly supported by substantial evidence in that plaintiff was convicted of a crime involving moral turpitude; and (2) the Administrative Procedure Act is not violative of the fourteenth amendment.

(2) Plaintiff's First Amended Complaint fails to state a claim upon which relief could be granted against defendants John J. Corcoran and the California State Board of Accountancy because plaintiff's challenge to his state court criminal conviction, which forms the basis of his first amended complaint, has already been litigated and decided adversely to the plaintiff in a federal habeas corpus action and principles of res judicata bar him from relitigating the same issue in this court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Mildred KENNEDY and Lillian Ross, Plaintiffs,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Defendants.

Civ. A. No. 77-K-974.

United States District Court, D. Colorado.

May 10, 1978.

Action was brought under Age Discrimination in Employment Act, with pendent state law tort and contract claims also asserted. Employer moved to dismiss the amended complaint. The District Court, Kane, J., held that: (1) punitive damages are recoverable under the Act; (2) there is a right of jury trial in proceeding under the Act, and (3) court would decline to exercise jurisdiction over the pendent state claims.

Motion granted in part and denied in part.

1. Labor Relations ⇐20.15

Punitive damages are recoverable in a suit under Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7, 7(c), 29 U.S.C.A. §§ 621 et seq., 626, 626(c).

2. Federal Courts ⇐15

Issue of whether to accept jurisdiction of state contract and tort claims in a federal question suit is discretionary with the district court.

3. Federal Courts ⇐15

Federal court, in Age Discrimination in Employment Act suit, declined to accept jurisdiction of state contract and tort claims since damages were recoverable under the tort claim for intentional infliction of emotional distress, were punitive in nature and award of punitive damages could be had under the ADEA. The breach of contract claims lacked sufficient relationship to the federal cause of action and its inclusion would cloud the issues and complicate matters of proof. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4. Federal Civil Procedure ⟹2069

Right of jury trial exists in actions under Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7, 7(c), 29 U.S.C.A. §§ 621 et seq., 626, 626(c).

Howard A. Roitman, Denver, Colo., for plaintiffs.

Rodney L. Smith, Denver, Colo., for defendants.

MEMORANDUM OPINION AND ORDER

KANE, District Judge.

THIS MATTER is before the court on a motion to dismiss the amended complaint filed by defendant Mountain States Telephone and Telegraph Company on November 21, 1977. Defendant moves as follows: to dismiss all claims for non-willful violations of the Age Discrimination and Employment Act of 1967 because such claims were not filed within two years of their occurrence; to dismiss claims for pain and suffering because such claims are not compensable under the Act; and to deny plaintiffs' request for a jury trial. Further, defendant moves to dismiss the second and third claims for relief which set forth state causes of action for breach of contract and tortious infliction of emotional distress. In the alternative, defendant moves to dismiss plaintiff's claims for attorney's fees, interest and costs for the second and third claims for relief because such fees and costs are not properly awardable in this type of case.

Plaintiffs filed this action under the Age Discrimination in Employment Act [ADEA], 29 U.S.C. § 621, *et seq.*, alleging that they were demoted on May 5, 1975 because of their ages and were not returned to their positions in management until December 28, 1975. It is alleged that the demotions were the result of age discrimination by defendant which resulted in a loss of compensation in the amount of approximately $5,000 each; loss of participation in the management savings program; reduction in pension rights; and denial of other fringe benefits. Plaintiffs also alleged that they suffered physical pain and undue mental suffering as a result of defendant's actions. Plaintiffs submit that the actions complained of constitute willful violations of 26 U.S.C. § 623(a).

STATUTE OF LIMITATIONS

Defendant has moved the court to dismiss claims for all non-willful violations of the ADEA because such claims were not filed with this court within two years of their occurrences as required by 29 U.S.C. § 626(e). This section incorporates the statute of limitations set forth in the Portal-to-Portal Pay Act, 29 U.S.C. § 255(a). Although defendant has accurately cited the two year limitation period for non-willful violations, the amended complaint alleges that defendants actions were *willful* violations of the ADEA. 29 U.S.C. § 255(a) provides that "a cause of action arising out of a willful violation may be commenced within *three years* after the cause of action accrued." (emphasis added.) Plaintiff's action was filed well within the three year period. Accordingly, defendant's motion to dismiss on this ground is denied.

CLAIM FOR PUNITIVE DAMAGES

The purposes of the ADEA are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The protection afforded by this chapter is limited to "individuals who are at least forty years of age but less than sixty-five years of age." 29 U.S.C. § 631. The enforcement provisions of the ADEA state, in part, as follows:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief* as may be appropriate to effectuate the pur-

poses of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626 (emphasis added.) Subsection (c) permits "[a]ny person aggrieved [to] bring a civil action in any court of competent jurisdiction for such *legal or equitable relief as will effectuate the purposes of this chapter* . . . ." 29 U.S.C. § 626(c) (emphasis added.)

Most courts have analogized age discrimination cases brought under the ADEA with the provisions and case law governing Title VII of the Civil Rights Act of 1964. Although it has been recognized that the two statutes are not identical and that decisions construing Title VII are not totally dispositive of the issues raised under the ADEA, most courts have determined that a comparison is profitable. See *Murphy v. American Motors Sales Corp.*, 410 F.Supp. 1403 (N.D.Ga.1976).

A review of the decisions in other United States courts and their efforts to determine congressional intent regarding the availability of punitive damages under the ADEA reveals a sharp divergence. Punitive damages were allowed in *Walker v. Pettit Construction Co.*, 437 F.Supp. 730 (D.S.C.1977); *Coates v. National Cash Register Co.*, 433 F.Supp. 655 (W.D.Va.1977); *Bertrand v. Orkin Exterminating Company*, 432 F.Supp. 952 (N.D.Ill.1977); *Combes v. Griffin Television, Inc.*, 421 F.Supp. 841 (W.D.Okl.1976); *Murphy v. American Motors Sales Corporation*, 410 F.Supp. 1403 (N.D.Ga.1976). Other courts have denied recovery of punitive damages under the Age Act, *Dean v. American Security Insurance Company*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (2/21/78); *Rogers v. Exxon Research and Engineering Company*, 550 F.2d 834 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 770 (1978); *Fellows v. Medford Corporation*, 431 F.Supp. 199 (D.Or.1977); *Looney v. Commercial Union Assurance Companies*, 428 F.Supp. 533 (E.D.Mich.1977); *Hannon v. Continental National Bank*, 427 F.Supp. 215 (D.Colo. 1977); *Platt v. Burroughs Corporation*, 424 F.Supp. 1329 (E.D.Pa.1976); *Sant v. Mack Trucks, Inc.*, 424 F.Supp. 621 (N.D.Cal. 1976).

The essential difference in the enforcement provisions of Title VII and the ADEA is that relief under Title VII is limited to equitable remedies whereas the Age Act provides for both equitable and legal relief. All United States courts recognize that punitive damages are not recoverable under Title VII due to this statutory limitation to equitable relief. 42 U.S.C. § 2000e–5(g). 29 U.S.C. § 626(b) and (c) make it clear that the Age Act is not so limited.

Further, most courts that have refused to make punitive damages available under the ADEA have also refused parties in a private suit under the ADEA to have trial by jury. The rationale in support of this latter position is based on the non-availability of a jury trial in Title VII cases. Such was recently rejected, however, by the United States Supreme Court in *Lorillard v. Pons*, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). In determining that the plaintiff was entitled to a jury trial under the ADEA, the court emphasized that 29 U.S.C. § 626(b) empowers a court to grant "legal or equitable relief." Recognizing that congress knew the significance of the phrase "legal relief" when the statute was drafted, the court distinguished Title VII:

> Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII.

Further, citing *Standard Oil v. United States*, 221 U.S. 1, 59, 31 S.Ct. 502, 515, 55 L.Ed. 619 (1911), the court stated:

> The word "legal" is a term of art . . . "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."

[1] The award of punitive damages has been recognized and treated as a legal rather than equitable remedy. *Pearson v. Western Electric Company*, 542 F.2d 1150 (10th Cir. 19.;). Taking into account the apparent congressional intent behind the inclusion of "legal" relief and the "long-established meaning [and] significance" of that term persuades this court that in a private action under the ADEA punitive damages will be available where sought by the plaintiff. *See generally Lorillard v. Pons, supra.* Accordingly, defendant's motion to dismiss this claim for relief is denied.

PENDENT STATE CLAIMS

[2, 3] The issue of whether to accept jurisdiction of the state contract and tort claims is discretionary with the court. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1136, 16 L.Ed.2d 218 (1966). We decline to exercise jurisdiction over these claims in this case. The damages recoverable under a tort claim for intentional infliction of emotional distress are punitive in nature. Since we have already ruled that punitive damages are recoverable under the ADEA, the plaintiffs' claims of mental distress can be remedied thereunder without resort to the state cause of action.

The breach of contract claim lacks sufficient relationship to the federal cause of action to convince this court that pendent jurisdiction should be exercised. The inevitable complications in matters of proof and concomitant clouding of issues supports this conclusion. Accordingly, defendant's motion to dismiss the state claims is granted.

JURY TRIAL

[4] Defendant's motion to dismiss plaintiffs' request for a jury trial is denied. *Lorillard v. Pons*, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

Accordingly,

IT IS ORDERED that the defendant's motion to dismiss the first claim for relief is denied; the motion to dismiss the second and third claims for relief is granted. Defendant is directed to respond to the plaintiffs' first claim for relief as set forth in its amended complaint on or before ten (10) days from the date hereof.

Hilda Cortes GONZALEZ, Plaintiff,

v.

Isaac BERAHA, Defendant.

No. CV 77-0420-B.

United States District Court,
D. Canal Zone,
Balboa Division.

May 12, 1978.

Plaintiff former wife brought action to modify a Panama court's divorce decree so as to increase the amount of child support from defendant former husband. The District Court, Charles R. Scott, Senior District Judge, Middle District of Florida, held that: (1) final divorce decree of a Panama court in 1965 would be recognized; (2) Court would not abstain and defer to the courts of Panama in action brought by former wife, a resident of United States but a citizen of Panama, notwithstanding that both parties were citizens of Panama who were divorced in Panama and that defendant former husband was a resident of Panama as well, and (3) evidence failed to justify increase in child support, since approximately one quarter of defendant former husband's annual income was already obligated for child support payments by the 1965 Panamanian divorce decree.

Order accordingly.

1. Divorce ⚿403(7)

United States District Court of Canal Zone had jurisdiction over action of former wife, a resident of California, for modification of a Panama court's divorce decree to

Tony CARVALHO, Plaintiff,

v.

MacARTHUR CORPORATION, Defendant.

No. 83-8280-Civ-JCP.

United States District Court, S.D. Florida.

May 24, 1985.

Defendant in Age Discrimination in Employment Act action filed motion for summary judgment. The District Court, Paine, J., held that: (1) plaintiff was not entitled to either compensatory or punitive damages under Act, and (2) plaintiff's untenable damage claims, his unorthodox opposition to defendant's motion for summary judgment, and filings which were required thereof, warranted awarding of costs to defendant.

So ordered.

1. Civil Rights ⚷46(18)

Plaintiff in Age Discrimination in Employment Act [29 U.S.C.A. § 621 et seq.] case was not entitled to either compensatory or punitive damages under Act. Age Discrimination in Employment Act of 1962, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2. Federal Civil Procedure ⚷661

Plaintiff's legally untenable claims to compensatory and punitive damages under Age Discrimination in Employment Act [29 U.S.C.A. § 621 et seq.], his unorthodox opposition to defendant's motion for summary judgment, and filings which were required by virtue thereof, warranted awarding of costs to defendant under Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A. requiring that pleadings be filed in good faith. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

Evan I. Fetterman, Law Offices of Fetterman & Assoc., North Palm Beach, Fla., for plaintiff.

Paul C. Heidmann, Herbert Mintz, Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, P.A., Miami, Fla., David Bradford, Niles, Ill., for MacArthur Corp.

ORDER

PAINE, District Judge.

THIS CAUSE is before the Court on a motion for summary judgment, filed on behalf of the defendant, MacArthur Corporation [D.E. 16]. That motion claims that the plaintiff, whose action was brought under the Age Discrimination in Employment Act [hereafter ADEA], Title 29 U.S.C. § 621 *et seq.*, is not entitled to either compensatory or punitive damages under the Act. Therefore, defendant argues, that portion of plaintiff's Count II, whereby he sought damages for "... extreme embarrassment and humiliation, and irreparable injury to his employment record ..." and Count III of the complaint, which sought punitive damages, should be adjudged summarily in defendant's favor.

This seemingly straightforward motion has spawned a heated and protracted series of pleadings:

D.E. 19—Memo in opposition to motion for summary judgment [filed by plaintiff];

D.E. 20—Motion to strike opposition memo [filed by defendant]

D.E. 21—Supplementary motion to strike and reply memo to opposition memo [filed by defendant]

D.E. 22—Memo in opposition to motion to strike [filed by plaintiff]

D.E. 24—Reply memo in support of motion to strike opposition mem [filed by defendant]

This Court has considered each of these filings, not because such a plethora of memos is in the least appropriate to such a motion, but in its desire to, fairly and finally, put the matter to rest.

[1] The legal issue is quite clear to this Court. Under the holding of *Dean v. American Security Insurance Co.*, 559

F.2d 1036 (5th Cir.1977), *cert. denied* 434 U.S. 1066, 98 S.Ct. 1243, 55 L.Ed.2d 767 (1978), which is binding upon this Court under the holding of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the plaintiff is not entitled to either compensatory or punitive damages under the ADEA. Plaintiff's untimely proffer of legal authority to the contrary (*Brenimer v. Great Western Sugar Co.*, 567 F.Supp. 218 (D.Colo.1983); *Wise v. Olan Mills, Inc., of Texas*, 485 F.Supp. 542 (D.Colo.1980); and *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F.Supp. 1008 (D.Colo.1978)) is wholly without even academic merit, much less persuasive or binding effect on this Court, in light of the decision rendered in *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654 (10th Cir.1984). Therefore, this court finds that, as a matter of law, the defendant is entitled to partial summary judgment on plaintiff's claim in Count II for compensatory damages and in Count III for punitive damages.

[2] The other issue, which seems to have overshadowed the substantive legal issue presented by the motion, is whether the plaintiff's legally untenable damages claims, his unorthodox opposition to the defendant's motion for summary judgment, and the filings which defendant feels were unnecessarily required by virtue thereof, warrant the awarding of costs to the defendant. This Court feels they do warrant an award of costs which the defendant has incurred in connection with the filings listed at the beginning of this order.

The defendant's motion to strike and reply memorandum in support thereof [D.E. 20 & 24] offer a straightforward recitation of the grounds which justify the imposition of costs on the plaintiff. Of these, this Court is most concerned with the plaintiff's transparent attempt to avoid addressing the legal issue of damages under the ADEA by arguing that one of the counts was not brought under the ADEA, but was a pendent claim for conspiracy. This, the Court finds specious, in the face of a complaint which expressly states that it is brought under the ADEA, whose only jurisdictional bases pertain to federal civil rights claims and the ADEA, and which is wholly devoid of any reference to Florida law or conspiracy. Moreover, when the defendant first raised the impropriety of the compensatory and punitive damages sought by affirmative defense, and plaintiff responded to the affirmative defenses, plaintiff did not argue that Count III was intended to state a pendent state claim. To add insult to injury, five months after the motion to strike was filed by the defendant, the plaintiff changed its tack and attempted to offer District Court cases from Colorado, to argue that punitive and compensatory damages were permitted under the ADEA. This untimely, unpersuasive, and borderline unethical act of the plaintiff simply underscores the inappropriateness of the matter. This the Court will not condone. This is not vigorous advocacy on behalf of one's client, but legal folly. It has cost each client money, has delayed the progress of the case and, no doubt, has eroded working relations between counsel for the parties concerned.

As to the pleadings here concerned, this Court finds that they were not well-grounded in fact or warranted by existing law. Indeed, they could not even be said to constitute a good faith argument for the modification or reversal of existing law. As such, they are in violation of Rule 11, Fed.R.Civ.P. and subject to sanction.

It is hereby

ORDERED and ADJUDGED that the motion for partial summary judgment of the defendant, MacARTHUR CORPORATION, is granted, and this Court will not consider compensatory or punitive damages under plaintiff's claims;

FURTHER ORDERED and ADJUDGED that, as a sanction under Rule 11, FED.R. CIV.P., plaintiff's counsel shall pay the defendant the amount of the reasonable expenses incurred because of the filings necessitated, as well as a reasonable attorney's fee. Defendant is directed to file with the Court within twenty days of the date of this order an affidavit as to attorney's fees and a bill of costs on the appropriate federal form, which may be obtained from the Clerk of the Court;

FURTHER ORDERED and ADJUDGED that the Clerk of the Court change the docket sheet in this case to reflect only McArthur Corporation as a party plaintiff, as Holiday Inns, Inc. was previously dismissed from the case. All future filings by the parties shall be styled accordingly.

Michele SOMMERVILLE, Plaintiff,

v.

Margaret M. HECKLER, Secretary of Health and Human Services, Defendant.

No. C84–1799A.

United States District Court, N.D. Ohio, E.D.

May 31, 1985.

Mother, on behalf of her child, brought action for judicial review of decision of Secretary of Department of Health and Human Services denying her application for surviving child's insurance benefits. The District Court, Dowd, J., held that child who was born out of wedlock was entitled to surviving child's insurance benefits following death of his natural father.

Ordered accordingly.

Social Security and Public Welfare ⚷137

Child who was born out of wedlock was entitled to surviving child's insurance benefits following death of his natural father where Ohio probate court had determined that decedent was the natural father and that child was thus entitled to participate in distribution of decedent's estate by intestate succession under Ohio Uniform Parentage Act, and such determinations were accepted by Secretary of Department of Health and Human Services. Social Security Act, §§ 202(d)(1), 216(h)(2)(A), as amended, 42 U.S.C.A. §§ 402(d)(1), 416(h)(2)(A); Ohio R.C. §§ 2105.18, 3111.01 et seq.

Thomas R. Pitts, Ben Sheere Co., Akron, Ohio, for plaintiff.

Richard J. French, Asst. U.S. Atty., Cleveland, Ohio, for defendant.

MEMORANDUM OPINION

DOWD, District Judge.

Plaintiff Michele Sommerville brings this action for judicial review of a final decision of the Secretary of the Department of Health and Human Services denying plaintiff's application for surviving child's insurance benefits under 42 U.S.C. § 402(d)(1).

Plaintiff filed her complaint in this case pursuant to 42 U.S.C. § 402(g) with this Court on May 30, 1984. Defendant filed her answer to plaintiff's complaint on August 31, 1984. Plaintiff filed her motion for summary judgment on October 12, 1984, and defendant filed her motion for summary judgment on October 19, 1984. Pursuant to the Court's order of May 30, 1984, assigning this case to United States Magistrate Charles R. Laurie, Magistrate Laurie issued his Report and Recommendation of this case on May 6, 1985, in which he recommended that plaintiff's motion for summary judgment be granted, defendant's motion for summary judgment be denied, and that plaintiff be awarded a back payment of benefits from the time they were discontinued in February of 1983. The defendant has filed objections to the Magistrate's report and recommendation, and plaintiff has filed her response thereto. In order to properly understand the current status of this case, a review of its procedural history is necessary.

PROCEEDINGS BELOW

Plaintiff filed an application for surviving child's insurance benefits on behalf of

See 29 USCA §626,
pg 161

Colo. { 449 F. Supp. 1008
~~427 F Supp 215~~
410 F Supp 1403

ed States v. Springfield, 829 F.2d 860 (9th Cir.1987) (applying categorical "nature of the offense" test in determining that involuntary manslaughter is a crime of violence).

Thus, this court must examine the crime of extortion under color of official right in its generic form. The particular facts of this case are irrelevant to the analysis. In looking at the crime in its generic form, the court finds that it is not a crime of violence. In the usual scenario, a public official uses his *power as an official* to extort property from another. *See United States v. Williams,* 621 F.2d 123, 124 (5th Cir.1980) ("The coercive element is supplied by the existence of the public office itself."), *cert. denied,* 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). No force or violence is involved, and there is almost no risk that force or violence will occur. A public official gets what he wants merely because he is a public official; he has no need for force. Thus, extortion under color of official right is not a "crime that usually involves a risk of harm," *United States v. Gonzalez-Lopez,* 911 F.2d at 547, and, consequently, "by its nature," it is not a crime of violence.[5]

The court hereby finds that defendant Calvin Clark is NOT GUILTY of a violation of 18 U.S.C. § 924(c). Extortion under color of official right is not a crime of violence as a matter of law.

Accordingly, let judgment of ACQUITTAL be entered for defendant as to Count Two.

SO ORDERED.

Ennis GRIMES, Sr., Plaintiff,

v.

CITY OF FORT VALLEY, et al., Defendants.

Civ. A. No. 89-43-4-MAC(DF).

United States District Court,
M.D. Georgia,
Macon Division.

Oct. 2, 1991.

Black male over the age of 40 brought age discrimination action when he was denied position of building inspector with city. Plaintiff moved for instatement to position. The District Court, Fitzpatrick, J., held that plaintiff was not entitled to instatement where job he was denied paid less than one he presently held and granting instatement would force city to discharge current building inspector who was unquestionably qualified for position.

Motion denied.

and the jury charges to see if the elements of the generic definition are present. If these elements are present in the indictment or jury charges, then the conviction was for a violent felony. However, if all of the elements of generic burglary are not present in either of these documents, then the conviction is not for a violent felony. The court cannot examine the particular circumstances of the case in making its determination. *Taylor,* 495 U.S. at ——, 110 S.Ct. at 2160, 109 L.Ed.2d at 629.

Since the determinations of a "crime of violence" and a "violent felony" are analogous, *Taylor* is additional precedent showing that a court must not look at the particular facts of a crime when performing a "crime of violence" analysis.

5. The government cites *United States v. O'Connor,* 910 F.2d 1466 (7th Cir.1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 953, 112 L.Ed.2d 1041 (1991), to support its argument that the generic form of the crime of extortion under color of official right *does* involve the use of actual or threatened force. In *O'Connor,* the Seventh Circuit stated that "a system of payment in exchange for official acts can itself demonstrate inducement: there is an *implied* threat of unpleasant consequences for nonpayment, whenever payment is a way of life." *Id.* at 1468 (emphasis in original).

The court disagrees with the government's interpretation that an "implied threat of unpleasant consequences for nonpayment" is equivalent to a "substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 924(c)(3)(B). Furthermore, there is no case law that supports the government's interpretation.

1. Civil Rights ⚷407

Black male over age of 40 who was discriminated against on basis of age when he applied for and was denied position of city building inspector was not entitled to recover back pay where job he was denied paid less than one he presently held.

2. Civil Rights ⚷407

Black male over age of 40, who was discriminated against on basis of age when he applied for and was denied position of city building inspector and who was not entitled to back pay because job he was denied paid less than one he presently held, was not entitled to front pay without award of back pay; under these circumstances, such an award would be speculative at best.

3. Civil Rights ⚷407

Compensatory and punitive damages are not recoverable under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

4. Civil Rights ⚷406

Black male over age of 40 who was discriminated against on basis of age when he applied for and was denied position of city building inspector was not entitled to be instated in the job; job offered less pay and fewer benefits than job male currently held and might be eliminated due to possible merger of governments and surrounding county and granting request would force city to discharge current building inspector who was unquestionably qualified for position.

5. Civil Rights ⚷407, 411

Black male over age of 40 who was discriminated against on basis of age when he applied for and was denied job as building inspector for city was entitled to nominal damages and attorney fees under Age Discrimination in Employment Act (ADEA); awarding nominal damages and attorney fees was consistent with purposes of Act in this unusual case in which job plaintiff was denied paid less than one he presently held. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

6. Civil Rights ⚷406

District court has broad discretion in selecting remedies as long as relief granted is consistent with purposes of Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

7. Civil Rights ⚷406

General rules of reinstatement should apply to issue of instatement under Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

8. Civil Rights ⚷406

Determination of whether reinstatement is appropriate remedy in particular age discrimination case lies solely within sound discretion of trial court. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

9. Civil Rights ⚷406

Jury verdict for plaintiff in age discrimination action does not automatically mandate reinstatement of employment to plaintiff. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

10. Civil Rights ⚷269

Rule that merely proving liability is not enough to recover but that plaintiff must also show how defendant's acts have damaged him and in what amount applies to discrimination cases just as it does to other civil cases.

Christopher Coates, Milledgeville, Ga., for plaintiff.

Charles R. Adams, Jr., Adams & Adams, Fort Valley, Ga., Mary Mendel Katz, Thomas F. Richardson, Chambless, Higdon & Carson, Macon, Ga., for defendants.

FITZPATRICK, District Judge.

Pending before the court is Plaintiff Ennis Grimes' motion for instatement to the position of Building Inspector of the City of Fort Valley, Georgia.

The Plaintiff, a black male over forty years of age, presently works as the Building Maintenance Supervisor for Fort Valley State College, where he currently earns $25,694.00 per year.[1] He applied for the position of Building Inspector with the City, which presently pays $23,076.56 per year, but was turned down. He then filed this lawsuit claiming that he was denied the job because of his race and age. On October 11, 1990, a jury returned a verdict in favor of the Plaintiff on his age discrimination claim, but against him on his claim of racial bias.

[1-3] There is no question that the Plaintiff has been the victim of discrimination; the problem lies in determining his relief. (All are agreed that this decision is to be made by the court.) He is not entitled to back pay, since the job he was denied pays less than the one he presently holds. Likewise, no authority has been found which would entitle him to front pay without an award of back pay and under these circumstances such an award would be speculative at best. *See, Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1332-33 (7th Cir.1987). Compensatory and punitive damages are not recoverable under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq. Carvalho v. MacArthur Corp.*, 615 F.Supp. 164, 164-65 (S.D.Fla.1985).

[4] The Plaintiff has therefore made a most unusual request. He has asked this court to instate him in the job of Building Inspector, which offers less pay and fewer benefits than the one he presently holds and which may well be eliminated due to a possible merger of the governments of the City of Fort Valley and the surrounding county. Granting this request would force the City to discharge Mrs. Barbara Hamrick, its current Building Inspector, who is unquestionably qualified for that position. The parties have negotiated extensively but have failed to reach a settlement.

[5, 6] The court will not grant the motion for instatement, but will instead award the Plaintiff nominal damages and attorney's fees as required by the ADEA. Although certainly less than what the Plaintiff sought, this result is in accord with the purpose of the ADEA. A "district court has broad discretion in selecting remedies as long as the relief granted is consistent with the purposes of the ADEA." *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1052 (11th Cir.1989). "The purpose of the ADEA, insofar as the individual plaintiff is concerned, is to make the plaintiff 'whole,' to restore the plaintiff to the economic position the plaintiff would have occupied but for the illegal discrimination of the employer." *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir.1988).

[7-9] It must be remembered that this is a motion for *instatement* rather than *reinstatement*. There is little precedent on the question of instatement, but the general rules of reinstatement should apply to this issue as well. "Reinstatement is the preferred remedy under the ADEA, and should be ordered whenever it is appropriate." *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 638 (10th Cir.1988). However, "[t]he determination of whether reinstatement is appropriate in a particular case lies solely within the sound discretion of the trial court. Furthermore, a jury verdict for [a] plaintiff in an age discrimination action does not automatically mandate reinstatement of employment to [the] plaintiff." *Kiel v. Goodyear Tire & Rubber Co.*, 575 F.Supp. 847, 848 (N.D.Ohio 1983), *aff'd*, 762 F.2d 1008 (6th Cir.1985).

Since the Plaintiff is, by analogy, not automatically entitled to instatement, even if that remedy could be considered the preferred one in a case like this, the court can fashion a plan of relief within its discretion as long as it is in accord with the purposes of the ADEA. Awarding nominal damages and attorney's fees is consistent with the purposes of the ADEA in this unusual

1. If the Plaintiff got his annual raise on July 1 of this year, his present salary would approach $27,000.00.

case. Granting the motion for instatement, by contrast, would in no way serve the ends of justice. The Plaintiff would not be made whole, but in fact would suffer by being placed in a worse economic position than he is at present. Moreover, Mrs. Hamrick, an innocent person, would lose her job and there appears to be no way the Defendants could minimize the harm to her. *See, Walters v. City of Atlanta,* 803 F.2d 1135, 1150 (11th Cir.1986).

[10] As an alternative reason for denying the motion, the court must point out that while there is no doubt that the Plaintiff has suffered harm, he has failed to show any resulting damage. It is axiomatic in civil trials that merely proving liability is not enough to recover; a plaintiff must also show how the defendant's acts have damaged him and in what amount. The court sees no reason why this general rule should not apply to discrimination cases just as it does to other civil cases such as commercial disputes. In this case, the Defendants' acts of discrimination actually benefitted the Plaintiff (within the scope of types of relief allowed under the ADEA). The Plaintiff has shown neither the existence nor amount of any damages recoverable under the ADEA.

The Supreme Court has applied this same rule in the context of constitutional violations. In *Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the Court held that damages awards in cases arising under 42 U.S.C. § 1983 for violations of the fourteenth amendment should be governed by the principle of compensation. 435 U.S. at 254–58, 98 S.Ct. at 1047–49. In *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986), a case involving the first and fourteenth amendments, the Court reaffirmed that damages are intended as compensation, and specifically held that "when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." 477 U.S. at 305–06, 106 S.Ct. at 2542.

The principle to be derived from these cases is that when there has been no compensable injury, there can be no damages. If this is true in the context of the violation of constitutional rights, then it certainly applies when a statutory right, e.g. the right to be free of age discrimination as given in the ADEA, has been violated. In this case, the Plaintiff has suffered no compensable injury, and the relief he requests would harm both him and another person. The only way to make him whole is to leave him where he is.

Accordingly, the Plaintiff's motion for instatement is DENIED, although the court will award him $100.00 in nominal damages and attorney's fees.[2] Plaintiff's counsel is directed to file his motion for attorney's fees and supporting documentation within fifteen (15) days of the receipt of this order.

SO ORDERED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff,

v.

J.H. STANLEY, Individually and as Temporary Administrator of the Estate of Mary Ann Stanley, Deceased, Betty B. Blocker, Merriam Kenneth Blocker, and Spencer Youngblood, Defendants.

No. CV 489–254.

United States District Court,
S.D. Georgia,
Savannah Division.

March 18, 1991.

Automobile insurer sought declaration as to its liability arising out of automobile

2. The Defendants have noted that the Plaintiff did not request that the court charge the jury on the question of nominal damages. Nonetheless, the court believes it has the inherent power to make such an award under the authority of *Verbraeken,* 881 F.2d 1041.

nsidered in determining whether ction settlement are (1) strength in merits measured against terms omplexity, length and expense of on., (3) degree of opposition to esence of collusion in gaining nion of competent counsel as to settlement, and (6) stage of proount of discovery completed. igton Co. (1991, ND Ind) 755 F 1551.

vidence of ADEA plaintiff's reion fraud is applicable to deterntiff is precluded from seeking however, to safeguard against misrepresentation or omission must be directly related to emmployment, and must have been employer in making decision. ille Life Ins. Co. (1993, WD Pa) 3 CCH EPD ¶ 42899, vacated, CA3 Pa) 31 F3d 1221, 65 BNA

1 by ADEA plaintiff in settlescrimination claim is taxable as proceeds from settlement are rsonal injuries. Drase v United l) 65 BNA FEP Cas 1116, 94-2 TNT 173-7.

" provision in 29 USCS § 626(b) wholesale incorporation of 29 her, provision requires selective FLSA's limited remedies into ocal 350, Plumbers & Pipefitters F Supp 417, 63 BNA FEP Cas

ve history, intent and purposes readth of discretion courts have l and equitable relief as they e to achieve those purposes. against labor organizations viopacity of labor organizations is able relief. EEOC Policy State5/11/90.

discriminated against because t be instated in job that he was ied since such job offered less its than one he presently holds, n merger of local governments, estionably qualified person who fired; rather, plaintiff will be mages of $100 and attorney's Valley (1991, MD Ga) 773 F FEP Cas 30.

l does not preclude ADEA suit, ay not recover double damages. Tree Expert Co. (1988, CA10 , 45 BNA FEP Cas 1386, 45 24 Fed Rules Evid Serv 875, (among conflicting authorities ston Corp. (CA7 Wis) 869 F2d P Cas 395, 49 CCH EPD eding (ED Wis) 728 F Supp Cas 1778, 53 CCH EPD g conflicting authorities noted tter Reynolds, Inc. (CA5 Tex) FEP Cas 529, 54 CCH EPD CA5) 1990 US App LEXIS JS) 114 L Ed 2d 456, 111 S Ct P Cas 1232, 56 CCH EPD l, remanded (CA5) 1991 US

App LEXIS 17278) and (disagreed with by Branson v Price River Coal Co. (CA10 Utah) 853 F2d 768, 46 BNA FEP Cas 1003, 46 CCH EPD ¶ 37958 (among conflicting authorities noted in Waller v Consolidated Freightways Corp. (DC Kan) 1991 US Dist LEXIS 10413)) as stated in Whitten v Farmland Industries, Inc. (DC Kan) 759 F Supp 1522.

In reviewing monetary award in ADEA case, appeals court may reduce amount of award only if it exceeds any rational estimate of damages, or if trial court lacked authority to make certain award. Linn v Andover Newton Theological School, Inc. (1989, CA1 Mass) 874 F2d 1, 49 BNA FEP Cas 1176, 50 CCH EPD ¶ 38969.

In ADEA action wherein district court found that employer willfully violated ADEA because it denied profit sharing contributions and forfeiture allocations and pension plan credits to employees over age of 65, district court properly awarded previously retired appellees present value of future pension losses rather than ordering employer to adjust their pension payments on monthly basis. American Assn. of Retired Persons v Farmers Group, Inc. (1991, CA9 Cal) 943 F2d 996, 91 CDOS 6607, 91 Daily Journal DAR 10177, 14 EBC 1120, 56 BNA FEP Cas 1183, 57 CCH EPD ¶ 40951.

Since jury was instructed on damages count by count and returned award on each count separately, damages awarded on each count should have been examined separately, rather than as lump sum, to determine whether damages award was excessive, duplicative or contrary to evidence. Biggins v Hazen Paper Co. (1992, CA1 Mass) 57 BNA FEP Cas 1160.

Since unions are liable for monetary damages under Fair Labor Standards Act when acting as employer, unions are liable for such damages in action brought under ADEA. LaPointe v United Autoworkers Local 600 (1993, CA6 Mich) 8 F3d 376, 63 BNA FEP Cas 262, 63 CCH EPD ¶ 42641, reh, en banc, den (CA6) 1993 US App LEXIS 32559.

Although it is unlawful for labor organization to discriminate against any individual because of his age or to cause or attempt to cause employer to discriminate against individual, remedial scheme of ADEA does not permit actions to recover monetary damages, including backpay, against labor organization. Nicolaisen v Chicago & Northwestern Transp. Co. (1991, DC Kan) 57 BNA FEP Cas 468, 138 BNA LRRM 2863.

Regardless of whether plaintiff in ADEA case suffered economic harm as result of her employer's employment decision, employer may be subject to liability for employment discrimination even if she incurred only nominal damage. Brockhouse v Southwestern Bell Tel. Co. (1991, WD Mo) 1991 US Dist LEXIS 171.

Under ADEA, party can only recover damages in form of lost earnings. Harter v GAF Corp. (1993, DC NJ) 150 FRD 502.

Compensatory damages are within remedial structure of ADEA; however, punitive damages are not recoverable. Eggleston v South Bend Community Sch. Corp. (1994, ND Ind) 64 BNA FEP Cas 999.

Spouse of ADEA plaintiff cannot assert derivative state law claim for loss of consortium premised solely on defendant's alleged violation of ADEA vis-a-vis plaintiff. Godby v Electrolux Corp. (1994, ND Ga) 65 BNA FEP Cas 211.

Mere fact that government agency (EEOC) serves as plaintiff in ADEA case brought against union, is not, in and of itself, sufficient reason to find monetary liability against union. EEOC v Local 350, Plumbers & Pipefitters (1994, DC Nev) 842 F Supp 417, 63 BNA FEP Cas 1170.

ADEA plaintiff's claim was dismissed for failure to show actual damages, where it was undisputed that plaintiff did not lose her position with employer, and plaintiff did not present any evidence of lost wages. Monica v New York City Off-Track Betting Corp. (1995, SD NY) 67 BNA FEP Cas 704.

All damages received in ADEA lawsuit are, for taxation purposes, excludable from gross income, since ADEA compensation scheme evidences tort-like conception of injury and remedy. Downey v Commissioner (1993, TC) 62 BNA FEP Cas 361, 93 TNT 138-14.

Individual middle-level former employees who had authority and discretion over plaintiff's age-discriminatory discharge can be subject to personal liability for monetary damages under ADEA. House v Cannon Mills Co. (1988, MD NC) 713 F Supp 159, 49 BNA FEP Cas 1746, 51 CCH EPD ¶ 39320.

When EEOC finds reasonable cause that labor organization has violated ADEA, it will seek full range of equitable and legal remedies, including monetary damages, as appropriate under facts of case. EEOC Policy Statement No. 915.053, 5/11/90.

Plaintiff who was discriminated against because of his age would not be instated in job that he was discriminatorily denied since such job offered less pay and fewer benefits than one he presently holds, may be eliminated in merger of local governments, and is held by unquestionably qualified person who would have to be fired; rather, plaintiff will be granted nominal damages of $100 and attorney's fees. Grimes v Ft. Valley (1991, MD Ga) 773 F Supp 1536, 57 BNA FEP Cas 30.

Compensatory and punitive damages are not recoverable under Age Discrimination in Employment Act. Grimes v Ft. Valley (1991, MD Ga) 773 F Supp 1536, 57 BNA FEP Cas 30.

ADEA, as amended by Civil Rights Act of 1991, permits recoupment of compensatory and punitive damages; however, such damages are not applicable in cases which arose prior to 11/21/91 (effective date of 1991 Act). Bender v Salvation Army (1993, MD Fla) 830 F Supp 1454, 7 FLW Fed D 389.

Damages awarded to ADEA plaintiff as result of suit brought against former employer under ADEA are excludable from gross income under 26 USCS § 104(a)(2). Fite v Commissioner (1993) 63 BNA FEP Cas 910, TC Memo 1993-594, RIA TC Memo ¶ 93594, 66 CCH TCM 1588, 93 TNT 256-16.

Former employee is entitled to exclude from his gross income payments that he received in settlement of his suit for age discrimination under ADEA. Cassino v Commissioner (1994) 66 BNA FEP Cas 1337, TC Memo 1994-65, RIA TC Memo ¶ 94065, 67 CCH TCM 2193, 94 TNT 36-8.

101. Back pay

If defendant in ADEA case is found to have acted willfully, court does not have discretion to reduce liquidated damages award; backpay award must be doubled. Spanier v Morrison's Management Services, Inc. (1987, CA11 Ala) 822 F2d 975, 44 BNA FEP Cas 628, 44 CCH EPD ¶ 37319.

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

(Pub.L. 90-202, § 6, Dec. 15, 1967, 81 Stat. 604.)

HISTORICAL AND STATUTORY NOTES

Transfer of Functions

All functions vested by this section in the Secretary of Labor or the Civil Service Commission were transferred to the Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in Appendix 1 to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

Legislative History

For legislative history and purpose of Pub.L. 90-202, see 1967 U.S.Code Cong. and Adm.News, p. 2213.

FEDERAL PRACTICE AND PROCEDURE

Class actions maintainable, see Wright & Miller: Civil § 1772 et seq.

WEST'S FEDERAL PRACTICE MANUAL

Former enforcement procedures, see § 15394.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as